Supreme Court, U.S.
FILED
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No. _____

In The
Supreme Court of the United States
October Term 2008

Akisha Wordlaw,
Plaintiff-Petitioner,

v.

The Oregon Department of Corrections;
and The Oregon Youth Authority,
Delmar Leon Vaughn and
Rick Hill
Defendants-Respondents.

On Petition for Writ of Certiorari
to the Supreme Court of the State of Oregon

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Plaintiff brought a section 1983 claim in state court, alleging that at age 14 she was sexually abused by her youth counselor while incarcerated at a state institution. Her case was dismissed based on a statue of limitations defense. The question is whether the Oregon courts are entitled to disregard the statute of limitation "discovery rule" applied in federal civil rights cases in favor of Oregon's more restrictive "tort claims" discovery rule.

PARTIES OF INTEREST

Plaintiff

Akisha Wordlaw

Defendants-Respondents

The Oregon Department of Corrections

The Oregon Youth Authority

Delmar Leon Vaughn

Rick Hill

TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	1
Applicable Constitution and Statutory Provisions	1
Statement of the Case	3
Issue Raised in Lower Courts	5
Argument	5
In evaluating petitioner's civil rights claim, the Oregon Court disregarded established federal caselaw regarding when plaintiff "discovered" her federal civil rights claims	5
Review by the court is important because Oregon court decisions regarding section 1983 claims are at odds with established law regarding federalism and federal-state relations	11
Conclusion	16
Appendix	A-1

TABLE OF AUTHORITIES

Cases	Page
Bibeau v. Pacific Northwest Research Foundation, Inc., 188 F3d 1105 (9th Cir. 1999) . .	6,7,8,9,10
Cooksey v. Portland Public School District No. 1, 143 Or App 527, 923 P2d 1328 (1996).	6, 16
Douglas v. New York NH & HR Co, 279 US 377, 49 S. Ct. 355, 73 L Ed 747 (1929)	11
Felder v. Casey, 487 US 131, 108 S. Ct. 2302, 101 L Ed 2d 123 (1988).	12,13
Hardin v. Straub, 490 US 536, 543, 109 S. Ct. 1998, 104 L Ed 2d 582 (1989)	5
Howlett v. Rose, 496 US 356, 110 S. Ct. 2430, 110 L Ed 2d 332 (1990).	15
Martinez v. California, 444 US 277, 100 S. Ct. 553, 62 L Ed 2d 481 (1980)	12
Quern v. Jordan, 440 US 332, 995 S. Ct. 1139, 59 L Ed 2d 358 (1979).	14
Rogers v. Saylor, 306 Or 267, 760 P2d 232 (1988)	15
Sanok v. Grimes, 306 Or 259, 760 P2d 228 (1988)	6, 7

Will v. Michigan Dept. of State Police, 491 US 58, 109 S. Ct. 2304, 105 L Ed 2d 45 (1989). 14

Wilson v. Garcia, 471 US 261, 105 S. Ct. 1938, 85 L Ed 2d 254 (1985). 5,11,14

Federal Constitutional Provisions **Page**

United States Constitution, Article VI, Clause 2. 2

United States Constitution, Amendment XI. . . . 2

Federal Statutes **Page**

28 USC § 1257(a). 1

42 USC § 1983 . . . . . 1, 5

State Statutes **Page**

ORS 12.110 6

ORS 30.275 7

Other Authorities **Page**

ORCP 21 10

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On August 15, 2007, the Court of Appeals affirmed the trial court's decision without opinion. The Supreme Court denied the petition for review on January 23, 2008.

JURISDICTION

The state trial court dismissed plaintiff's civil rights claim, based solely on the allegations in plaintiff's complaint, as time barred. Plaintiff appealed the dismissal to the Oregon Court of Appeals which affirmed the lower court's decision without opinion. Plaintiff appealed to the Oregon Supreme Court which denied review. This court has jurisdiction pursuant to 28 USC § 1257(a).

APPLICABLE CONSTITUTION AND STATUTORY PROVISIONS

42 USC § 1983 provides in relevant part:

> "Every person who, under color of any statute, ordinance, regulations, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States

> or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress."

The United States Constitution, Article VI, Clause 2 provides in relevant part:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The United States Constitution, Amendment XI provides in relevant part:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

STATEMENT OF THE CASE

In her civil rights claim, plaintiff alleged that during her time of incarceration at a youth correctional facility and subsequently between December 1, 1998, and January 4, 1999, she was sexually assaulted by defendant Vaughn, a youth counselor there. As noted, plaintiff was 14.

Defendant Vaughn was found guilty of rape in the third degree and official misconduct in the first degree in the circuit court of Clackamas County on April 28, 2000, as a result of the aforementioned activities with plaintiff.

Plaintiff also alleged that defendant Hill had a custom or practice of ignoring signs and reports of misconduct by the facilities' employees, including ignoring reports that defendant Vaughn and other officers at Hillcrest were engaging in inappropriate conduct with juvenile inmates. By ignoring misconduct by officers at Hillcrest, defendant Hill acted with deliberate indifference

to a known risk of constitutional deprivation to plaintiff and other juvenile inmates at Hillcrest.

And importantly, plaintiff alleged that on or about July, 2005, plaintiff discovered defendant Hill had a custom or practice of ignoring information and reports that agents, employees and officers of Hillcrest were breaking rules and violating boundaries with inmates. Prior to July, 2005, plaintiff did not discover, nor could she have reasonably discovered, defendant's practices in this regard, because such knowledge was specifically held by employees, agents and officers of Hillcrest. Such information was not available until the July, 2005, conviction of a former Oregon Youth Authority employee for sexually abusing young males in his care.

The trial court dismissed on the basis that her claims were time-barred. Court of Appeals Affirmed. Supreme Court affirmed.

ISSUE RAISED IN LOWER COURTS

Whether the proper law was applied to determine the statute of limitations for plaintiff's federal civil rights claim.

ARGUMENT

In evaluating petitioner's civil rights claim, the Oregon Court disregarded established federal caselaw regarding when plaintiff "discovered" her federal civil rights claims.

While 42 USC § 1983 does not include a statute of limitations, the United States Supreme Court established that the limitations period for section 1983 claims is governed by the state's personal injury statute of limitations. *Wilson v. Garcia,* 471 US 261, 276, 107 S. Ct. 1938, 85 L Ed 2d 254 (1985) (superseded by statute).

As a matter of law, state statutes and the 'discovery rule' used to toll the limitations period for personal injuries are equally effective in tolling section 1983 claims. *Hardin v. Straub,* 490 US 536, 543, 109 S. Ct. 1998, 104 L Ed 2d

582 (1989); *Bibeau v. Pacific Northwest Research Foundation, Inc.*, 188 F3d 1105 (1998).

In Oregon, the statute of limitations which regards personal injury actions and which has been applied to section 1983 claims is two years, and it is set forth in ORS 12.110.[1] *Sanok v. Grimes*, 306 Or 259, 760 P2d 228 (1988).

In dismissing plaintiff's section 1983 claims as time barred, the trial court relied on the holding in *Cooksey v. Portland Public School District No. 1*, 143 Or App 527, 923 P2d 1328 (1996). This was an erroneous legal analysis given that *Cooksey* relied on the Oregon Tort Claim Act, specifically ORS 30.275, which limits claims brought against state defendants. *Cooksey* held that the Oregon Tort Claim "notice" period was not tolled pending the appointment of a guardian ad litem. *Cooksey, supra.*

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[1] ORS 12.110(1) states: "An action for assault, battery, false imprisonment, or for any injury to the person or rights of another, not arising on contract, and not especially enumerated in this chapter, shall be commenced within two years * * *."

Federal and state case law clearly contradicts that legal analysis and conclusion. In *Sanok*, the Oregon Supreme Court held that plaintiff's claim was governed by the two-year limit of ORS 12.110 rather than the limit of ORS 30.275. *Sanok, supra* 306 Or at 263. In its decision, the Oregon Supreme Court also held that the federal character of a section 1983 claim requires that Oregon courts follow the applicable law. *Sanok, supra.*

The applicable federal law regarding the issue of when the clock began to tick on plaintiff's section 1983 claim is found in *Bibeau, supra,* 188 F3d at 1105. This federal case in which plaintiff alleged, among other things, state claims regarding battery and federal claims regarding section 1983, involved a former adult inmate, who while in the custody of the state of Oregon, voluntarily participated in research experiments the purpose of which were to test the effects of radiation on human testicular function.

Bibeau, supra, 188 F3d at 1105. In addition to consenting to these experiments, Mr. Bibeau also received compensation in exchange for participating in this project. *Bibeau, supra.*

By way of explanation, Mr. Bibeau was an inmate at the Oregon State Penitentiary in the 1960s and all experimentation on his body occurred during his period of incarceration. In 1993, which was approximately 30 years after his release, Mr. Bibeau watched a news report which carried an apology from the government regarding human experimentation it had performed and in which Mr. Bibeau participated. *Bibeau, supra;* 188 F3d at 1107. Within two years of watching this report, Mr. Bibeau commenced litigation for damages that he believed he had sustained as a result of this governmental experimentation. *Bibeau, supra.*

The state defendants filed a motion to dismiss all of his claims on the basis that plaintiff's claims were time-barred. *Bibeau, supra,* 188 F3d at 1108. The district court granted defendants' motion, Mr. Bibeau appealed this dismissal and the Appellate Court reversed the dismissal after concluding that Oregon's "discovery" rule which also governed his section 1983 claims tolled the limitation period and that it was inappropriate to grant defendants' motion given the disputed facts of the case. *Bibeau, supra.* The court reasoned that a trier of fact could conclude that plaintiff was diligent in discovering the facts and determining whether he had an actual claim despite plaintiff not taking heed of the painful symptoms he experienced as a result of the experiments or for not seeking medical help for his conditions for 30 years. *Bibeau, supra,* 188 F3d at 1109. The court also held that a trier of fact could find that a reasonable person might have

taken this lengthy period to make the final connection between his symptoms and the prison experimentation such that he would understand that he had a cause of action to pursue. *Bibeau, supra.* Importantly in its holding, the court stated that under the facts, the plaintiff's right to redress for his injuries simply outweighed the defendants' right to repose even though 30 years had passed since the experiments giving rise to his legal claims had taken place. *Bibeau, supra,* 188 F3d at 1111.

The Oregon trial court erred as a matter of law in granting defendants' motion to dismiss. The case law is clear that the discovery rule does apply to these types of federal claims. *Bibeau, supra,* 188 F3d at 1105. Further, the issue regarding when a plaintiff discovers her claim is a fact intensive analysis which is often not appropriate for summary determination by a judge. *Bibeau, supra* 188 F3d at 1111. Therefore, the court, in an ORCP 21A(9) hearing

in which it considers the pleadings only and does not hear testimony or other supporting evidence, should have allowed plaintiff leave to amend her complaint.

REASONS FOR GRANTING THE PETITION

Review by the court is important because Oregon court decisions regarding section 1983 claims are at odds with established law regarding federalism and federal-state relations.

While *Wilson v. Garcia* requires all state courts to apply their state's personal injury statute of limitations to section 1983 claims, instead, the Oregon court applied an Oregon Tort Claim Act statute of limitations analysis to determine whether the plaintiff's claims were timely filed. In doing so, it shortened the limitation period in which to bring her section 1983 claim. The court also denied plaintiff her federal right to pursue her section 1983 claims.

This was improper because a state court may not deny a federal right when the parties and controversies are properly before it in the absence of a valid excuse. *Douglas*

v. New York NH & HR Co., 279 US 377, 49 S. Ct. 355, 73 L Ed 747 (1929). An excuse that is inconsistent with or violates federal law is not a valid excuse. The supremacy clause forbids state courts to disassociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source.

These are long settled issues with respect to the interplay of federal law and the law of federal-state relations. For example, in *Martinez v. California*, 444 US 277, 100 S. Ct. 553, 62 L Ed 2d 481 (1980), this Court unanimously concluded that a California statute that purported to immunize public entities and public employees from any liability for parole release decisions was preempted by section 1983 even though the federal cause of action was being asserted in the state courts.

In *Felder v. Casey*, 487 US 131, 108 S. Ct. 2302, 101 L Ed 2d 123 (1988), this Court followed *Martinez* and held

that a Wisconsin notice-of-claim statute that effectively shortened the statute of limitations and imposed an exhaustion requirement on claims against public agencies and employees was preempted insofar as it was applied to section 1983 claims. This Court also stated that a consensus of federal court decisions at that time demonstrated that enforcement of the notice-of-claim statute in section 1983 actions brought in state courts interfered with and frustrated the substantive right Congress created. This Court, in its holding, concluded that the decision to subject state subdivisions to liability for violations of federal rights was a choice that Congress, not the Wisconsin Legislature, made and it is a decision that the state has no authority to overrule.

A state court may not vindicate the substantive interests underlying a state rule of decision at the expense of a federal right. *Felder, supra.* The very reason that this

Court in *Wilson v. Garcia* characterized section 1983 suits as claims for personal injuries was because such an approach ensured that the same limitations period would govern all section 1983 actions brought in any given state and thus comported with Congress' desire that the federal civil rights laws be given a uniform application within each state. A law that predictably alters the outcome of section 1983 claims depending solely on whether they are brought in state or federal court within the same state is obviously inconsistent with the federal interest in intra-state uniformity. *Felder, supra.*

Moreover, plaintiff could not bring her section 1983 claim for money damages against the state prison administrators in federal court because the 11th Amendment bars such actions. *Quern v. Jordan*, 440 US 332, 99 S. Ct. 1139, 59 L Ed 2d 358 (1979); *Will v. Michigan*

Dept. of State Police, 491 US 58, 109 S. Ct. 2304, 105 L Ed 2d 45 (1989).

Consequently, the state court hearing the federal claim must apply federal law correctly to ensure that a plaintiff's rights are not further limited or denied. And once a state court assumes jurisdiction over a federal claim, the supremacy clause requires it to resolve the claim consistently with federal law. States cannot reject a required federal outcome on the basis that state policy calls for a different result. *Howlett v. Rose*, 496 US 356, 110 S. Ct. 2430, 110 L Ed 2d 332 (1990).

Oregon courts should be aware of this rule. For example, in *Rogers v. Saylor*, 306 Or 267 (1988), the court held that the Oregon Tort Claim Act did not provide state-law based limited immunity to officers in the context of a plaintiff's section 1983 claim.

However, the Oregon courts did not apply this rule in the Wordlaw case. Instead, they relied upon a state decision, *Cooksey*, that analyzed the application of the Oregon Tort Claim Act discovery rule in dismissing plaintiff's section 1983 claim.

CONCLUSION

Oregon should not be allowed to move away from the protections and mandates of federal law. Ms. Wordlaw has suffered assault at the hands of a state employee and her suffering was compounded by the state courts' collective failure to follow established precedent regarding her federal civil rights claims. That she has been victimized repeatedly in this legal process is unconscionable. It is particularly so given that the federal law under which she sought redress for her injuries was enacted in the post-Civil War era to protect minorities from the whims and caprice of unrepentant state courts.

Without question, Oregon's state courts will be given *cart blanche* to arbitrarily disregard federal law to the detriment of its citizens unless this Writ of Certiorari is granted and the Oregon court decision is reversed.

Respectfully submitted,

MOOMAW, MILLER
& HILDEBRAND LLP

/s/ Robert J. Miller, Sr.
Robert J. Miller, Sr.

APPENDIX TO

Petition for Writ of Certiorari to the
Supreme Court of the United States

Appendix Index

Page

APPENDIX A

Order and General Judgment
Clackamas County Circuit Court, Oregon
March 13, 2006 ..... A-1

APPENDIX B

Opinion
Oregon Court of Appeals
August 15, 2007..... B-1

APPENDIX C

Order Denying Review
Oregon Supreme Court
January 23, 2008 ..... C-1

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF CLACKAMAS

AKISHA WORDLAW, Plaintiff, v. THE OREGON DEPARTMENT OF CORRRECTIONS; and THE OREGON YOUTH AUTHORITY, DELMAR LEON VAUGHN, and RICK HILL, Defendants.	Case No. CV05040913 ORDER AND GENERAL JUDGMENT

This matter having came before the Court on Defendants State of Oregon, the Oregon Youth Authority, Oregon Department of Corrections, and Rick Hill's motion to dismiss. Plaintiff filed a response and Defendants filed a reply. The Court being fully advised, it is therefore

ADJUDJED and DECREED that all the claims in Plaintiffs Amended Complaint are dismissed with prejudice and without leave to re-plead.

DATED this 13th day of March, 2006.

/s/ Roderick A. Boutin
Circuit Court Judge

Submitted by: Andrew Logerwell
Assistant Attorney General
Of Attorneys for Defendant

FILED: AUGUST 15, 2007

IN THE COURT OF APPEALS OF THE STATE OF OREGON

AKISHA WORDLAW
Plaintiff-Appellant,

v.

DEPARTMENT OF CORRECTIONS, OREGON YOUTH AUTHORITY, RICK HILL, and DELMAR LEON VAUGHN,
Defendants-Respondents.

Clackamas County Circuit Court
CV05040913

A131949

Roderick A. Boutin, Judge pro tempore

Argued and submitted: July 24, 2007

Before Landau, Presiding Judge, and Brewer, Chief Judge, and Schuman, Judge

Attorney for Appellant: Frank J. Godfrey, III

Attorney for Respondents Department of Corrections, Oregon Youth Authority, and Rick Hill: Judy C. Lucas

No appearance for respondent Delmar Leon Vaughn

AFFIRMED WITHOUT OPINION

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondents

[x] No costs allowed to respondent Delmar Leon Vaughn
[x] Costs allowed, payable by: Appellant

C-1

IN THE SUPREME COURT OF THE STATE OF OREGON

AKISHA WORDLAW
Plaintiff-Appellant, Petitioner on Review,

v.

DEPARTMENT OF CORRECTIONS, OREGON YOUTH AUTHORITY, RICK HILL, and DELMAR LEON VAUGHN,
Defendants-Respondents, Respondents on Review.

Court of Appeals
A131949

S055315

ORDER DENYING REVIEW

Upon consideration by the court.

The court has considered the petition for review and orders that it be denied.

January 23, 2008
DATE

/s/ Paul J. DeMuniz
CHIEF JUSTICE

c: Judy C Lucas
Robert J. Miller, Sr.
Delmar Leon Vaughn

vb/S055315odpr080123

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2008

Akisha Wordlaw,
Plaintiff-Petitioner,

v.

The Oregon Department of Corrections;
and The Oregon Youth Authority,
Delmar Leon Vaughn and
Rick Hill
Defendants-Respondents.

CERTIFICATE OF FILING

I, Robert J. Miller, Sr., being first duly sworn, depose and say that I am on the attorneys for Petitioner herein. That I filed the above PETITION FOR A WRIT OF CERTIORARI TO SUPREME COURT OF THE STATE OF OREGON with the Clerk of the Supreme Court of the United States on the 21st day of April, 2008, that it was placed in an envelope properly addressed with prepaid

postage thereon and deposited in the United States Post Office at Beaverton, Oregon.

/s/ Robert J. Miller, Sr.
Robert J. Miller, Sr.

SUBSCRIBED AND SWORN to before me this 21st day of April, 2008.

/s/ Tammy E. Noon
Notary Public for Oregon
My Commission Expires: 6/8/09

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON** on:

Mary Hazel Williams
Solicitor General
1162 Court St., NE, #400
Salem, OR 97301

Delmar Leon Vaughn
3540 N. Mississippi Ave.
Portland, OR 97227

this 21st day of April, 2008, by mailing to each three true and correct copies thereof, certified by me as such. I further certify that said copies were placed in sealed envelopes, addressed to said individuals at their regular office/home addresses; and said sealed envelopes were then deposited in the United States post office at Beaverton, Oregon on the day last above mentioned with the postage thereon fully paid.

/s/ Robert J. Miller, Sr.
Robert J. Miller, Sr.
Attorney for Petitioner